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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 589

LOREN L. LANDMAN, et al., *Appellants*,

v.

ROBERT MIEDZINSKI, Sheriff of St. Mary's County, *et al.*, *Appellees*.

On Appeal From the Court of Appeals for the State of Maryland

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Appellants appeal from a judgment of the Court of Appeals of Maryland entered on October 15, 1958, reversing a decree of the Circuit Court for St. Mary's County entered on July 21, 1958, and submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINIONS BELOW

The opinions of the Court of Appeals of Maryland and of the Circuit Court for St. Mary's County are unreported. Copies of both opinions and of the final judgment herein are attached hereto as Appendix A.

JURISDICTION

Appellants sued for a determination of invalidity of Chapter 18 of the Acts of Mayland of 1958 and for an injunction to prevent the appellees, acting under that statute, from interfering with the appellants' business. The asserted ground of invalidity was, *inter alia*, that the statute violates the Fourteenth Amendment to the Constitution of the United States. The Court of Appeals of Maryland sustained the validity of the statute against the claim that it was repugnant to the Constitution of the United States. The said court entered its judgment on October 15, 1958, and directed the clerk of the Court to transmit the mandate forthwith * * * for the passage of a decree declaring Chapter 18 to be constitutional and valid; thereafter the Circuit Court pursuant thereto entered the decree provided for which said decree was filed October 30th 1958. A notice of appeal was filed in that Court on December 11, 1958.

The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, United States Code, Sections 1257 (2) and 2101(c). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal: *Bryant* v. *Zimmerman*, 278 U.S. 63; *Standard Oil Company of California* v. *Johnson*, 316 U.S. 481; *Charleston Federal Savings and Loan Association* v. *Alderson*, 324 U.S. 182; *McCollum* v. *Board of Edu-*

cation; 333 U.S. 203; *Atchison, T. & S. F. R. Co.* v. *Public Utilities Commission of California,* 346 U.S. 346.

STATUTES INVOLVED

Chapter 18 of the Acts of Maryland of 1958, alleged herein to be invalid, is set forth in Appendix B. Also set forth in Appendix B are the following related statutes, the validity of which, however, is not here questioned:

Annotated Code of Maryland, Article 27, Section 237;

Chapters 181 and 183 of the Acts of Maryland of 1951.

QUESTION PRESENTED

Whether Chapter 18 of the Acts of Maryland of 1958 (hereinafter referred to as "the 1958 statute") is invalid for repugnancy to the Fourteenth Amendment to the Constitution of the United States because:

(1) it denies appellants the equal protection of the law by discriminating against them arbitrarily and without reasonable basis; and

(2) without due process of law, it deprives appellants of their liberty to engage in a lawful business and destroys the property they have invested in that business.

STATEMENT OF THE CASE

The appellants are engaged in the restaurant, tavern and amusement business. Each appellant owns and operates an establishment located on the waters of the Potomac River within the boundaries of the State of Maryland. Appellant Landman's establishment is in

St. Mary's County; those of the other appellants in Charles County. The various establishments are built upon piers extending into the river from the Virginia side, with the exception of one, that of appellant Freestone Amusement Company, which is on a vessel moored to such a pier. Each appellant, for several years past, has held licenses from the proper county authorities, issued pursuant to Chapters 181 and 183 of the Acts of Maryland of 1951, authorizing the operation and maintenance of coin-operated gaming devices. The current licenses run through April 30, 1959. The appellants have invested a total of about a million dollars in building and equipping their establishments and have paid to the respective county authorities a total of $85,350.00 for their current licenses. The revenues the appellants derive from the licensed gaming devices are indispensable to the profitable operation of their businesses. Without such revenues they would be forced out of business, thereby losing substantially all of their investments.

The 1958 statute made it a misdemeanor punishable by fine or imprisonment or both to maintain coin-operated gaming devices on any structure built upon or over any of the waters of the state which structure "cannot be entered from the shore of the State of Maryland by a person on foot." The appellees, the sheriffs of the respective counties, intended to enforce this statute on its effective date, June 1, 1958.

Therefore, on May 21, 1958, the appellants brought suit in the Circuit Court for St. Mary's County seeking (1) a declaration of invalidity of the 1958 statute under the Fourteenth Amendment to the Constitution of the United States as well as under the Maryland

constitution, and (2) an injunction to prevent appellees from interfereing with appellants' business.

The Circuit Court, by its opinion of July 9, 1958, and decree of July 21, 1958, held the 1958 statute invalid under the Maryland constitution, though not under the Constitution of the United States, and issued a permanent injunction against its enforcement. The appellees appealed to the Court of Appeals of Maryland, which, on October 15, 1958, reversed the judgment of the Circuit Court, holding the 1958 statute valid under both the federal and state constitutions. This appeal followed.

How the Federal Question Is Presented

The complaint alleged, among other grounds of invalidity, that the 1958 statute violates the Fourteenth Amendment to the constitution of the United States. It alleged that the statute violates the equal protection clause because it discriminates against the appellants without proper classification. (Complaint, para. 23; R. 31). It also invoked the due process clause by alleging that the enforcement of the statute would deprive them of their rights to engage in a lawful, licensed business (*id.*, para. 20; R. 30, 31) and would render their "property, premises and business . . . largely valueless" (*id.*, para. 25-b; R. 31, 32) and that the statute was invalid for ambiguity.[1] (*Id.*, para. 24; R. 31). The cause was submitted for decision under a stipulation that the facts alleged in the complaint, as recounted in this statement of the case, were to be taken as true. The Circuit Court, though holding the statute invalid under the Maryland constitution, sus-

[1] For further discussion of the presentation of the due process question see the following section of this Jurisdictional Statement.

tained its validity against attack under the United States Constitution. The Court of Appeals held the statute valid under both constitutions. The federal question is therefore properly before this Court.

THE QUESTIONS ARE SUBSTANTIAL

The issues involved in this appeal are substantial in that, if the judgment that the 1958 statute is valid is allowed to stand, appellants' business will have been destroyed in violation of rights guaranteed to them under the Fourteenth Amendment to the Constitution of the United States. The questions here presented are important, moreover, to the extent that they bear upon this Court's role in determining the validity of state statutes.

Prior to the enactment of the 1958 statute here in controversy, all forms of gambling were prohibited in Maryland (Annotated Code of Maryland, Art. 27, Sec. 237 [1957]), except in four counties where certain forms of gambling, including the gaming devices here involved, were lawful if licensed by appropriate county authorities. The four counties thus excepted from the otherwise general public policy against gambling are:

> Anne Arundel, by Chapter 321 of the Acts of 1943;
> St. Mary's by Chapter 181 of the Acts of 1951;
> Charles, by Chapter 183 of the Acts of 1951; and
> Calvert, by Chapter 184 of the Acts of 1951.

The substantial businesses of the appellants, having been duly licensed by the appropriate authorities of Charles and St. Mary's Counties, are admitted to have been lawful, but for the effect of the 1958 statute. (Answer, para. 4; R. 54). The 1958 statute, further regulating the manner in which "coin operated gam-

bling machine[s] or device[s]" may be operated in the counties where such business is lawful, is an attempt by the state to classify between those who may continue in that business in those counties and those who may not.

It is well settled that a classification which is arbitrary offends the constitutional guaranty of equal protection of the laws. *Smith* v. *Cahoon*, 283 U.S. 553; *Hartford Steam Boiler Inspection & Insurance Co.* v. *Harrison*, 301 U.S. 459, 462; *Skinner* v. *Oklahoma*, 316 U.S. 535. The classification, to be valid, must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike. *Magoun* v. *Illinois Trust and Savings Bank*, 170 U.S. 283; *Colgate* v. *Harvey*, 296 U.S. 404, 422, 423; *Morey* v. *Doud*, 354 U.S. 457.

The first question, then, in the instant case, is whether the fact that appellants' establishments, which are built over the waters of the State of Maryland, "cannot be entered from the shore of the State of Maryland by a person on foot", while similar establishments, built over the same waters in the same counties of Maryland, can be entered from the shore of Maryland by a person on foot, is a ground of difference having such a fair and substantial relation to some legitimate legislative objective as to authorize depriving the appellants of rights accorded to proprietors of those similar establishments.

The Circuit Court suggested in its opinion:

> The fact that the latter locations [those of the appellants, on the Virginia side of the Potomac River] are more difficult to police or that they

> infringe upon the policies of the neighboring Commonwealth of Virginia would seem to afford an adequate basis for different classification. Appendix, p. 4a).

The Court of Appeals agreed with this suggestion and added that the 1958 statute "was adopted chiefly for reasons of comity." (Appendix, p. 16a). But there is no evidence that the legislature entertained either of those objectives.

First, with regard to difficulty of policing, it has never been suggested, and nothing in this record suggests, that appellants' businesses ever gave rise to any special police problems. There is no reason to believe that their establishments ever required any more or any different policing than that given other business enterprises throughout the state. Nor could anyone suggest that elimination of the licensed gaming devices will make it possible to discontinue policing of those portions of the state where appellants' establishments are located. In *O'Connor* v. *City of Moscow*, 69 Idaho 37, 202 P. 2nd 401 (1949), an ordinance made it unlawful to operate, except in a certain section of the city, any new establishment where beer or liquor was sold by the drink or where certain types of gambling were maintained (including coin-operated gaming devices). The asserted justification of the ordinance was, among other things, that it facilitated policing. Holding the ordinance unconstitutional as sought to be applied to a transfer of ownership of an existing establishment in an unsanctioned section of the city, the Supreme Court of Idaho said (69 Idaho at 44, 202 P. 2nd at 405):

> Treating the ordinance as a pure police measure, designed, as expressed therein, to make easier

> the policing and health inspections of such businesses, and to prevent loitering and nuisances, we are of the opinion that the provision complained of is not a reasonable exercise of the police power and does not bear any reasonable, real or direct relationship, to the objects and purposes sought to be accomplished. Existing businesses under the same ownership are permitted to remain. Policing and health inspections and the prevention of loitering and nuisances are therefore not actually made easier, since the city authorities must continue to police and and inspect businesses in the same area as before.

Similarly here, since it would still be necessary, even with the licensed gaming devices eliminated, for state or county officers to visit appellants' establishment from time to time for general policing purposes, whether by boat or by automobile over Virginia roads, it is the sheerest of fictions to say that the 1958 statute was designed to facilitate policing.

Moreover, discussing the absolutely illogical premise that access by foot from the shore of Maryland is the test of policing facility, it is obvious from the statute that the achievement of such facility was not the objective. For example, one of the appellants could rebuild his business upon a pier extending from one of the islands in Chesapeake Bay which is within either Anne Arundel or Calvert County. He could ferry his customers to and from the island by boats connecting with the mainland. Since the island would be Maryland soil and since a person could go from it on foot into appellant's establishment, the 1958 statute would not be violated. Yet, if access by a person on foot is the test of policing facility, it is obvious that this island establishment would be impossible to reach

from the mainland of Maryland, whence, presumably the policing would be done. By contrast, the piers on which the present establishments are built are within practical reach by road without the necessity of employing boats. In view of the fact that the statute permits operations which are harder to police than those it prohibits, it is impossible to infer from the statute that its object is to facilitate policing. The attempted distinction between the few steps a policing official must take from the Virginia side of the river and the few steps he must take from the Maryland side in order to enter a pier wholly within Maryland waters is truly a distinction without a difference.

The contention that protection of an alleged Virginia policy was the object of the 1958 statute is equally impossible to sustain. Whatever doubt there might otherwise be as to this point is removed by the construction which the state courts have placed upon the statute. To save the statute against appellants' contention that it was void for ambiguity,[1] both of the courts below construed it to apply to any establishment located on any body of water within the territorial jurisdiction of Maryland if it could not be entered on food from the shore of Maryland.[2] It thus forbids the operation of an establishment, far removed from the Virginia border, on a barge moored in the middle of a lake or pond within any of the four counties where such business is recognized as lawful. It also forbids appellant Freestone Amusement Com-

[2] If the construction placed upon the statute by the courts below is taken as binding upon this Court, appellants concede that the statute is not void for ambiguity and, therefore, do not here press the third part of the question presented as stated in their notice of appeal. They submit, however, that, so construed, it is even more clearly violative of their rights under the Fourteenth Amendment.

pany, which operates its business on a vessel moored to a pier extending from the right bank of the Potomac, to move its vessel into the waters of Chesapeake Bay off the coast of Calvert County or Anne Arundel County and anchor it there, using boats to carry its customers from the mainland. Thus situated, perhaps fifty or seventy-five miles from Virginia, Freestone could obviously not impinge in any way upon any interest of that state. Yet, since the vessel could not be entered from the shore of Maryland by a person on foot, this operation would be prohibited by the 1958 statute. It is therefore impossible to infer from the statute that its object was to prevent impingement upon any alleged Virginia anti-gambling policy.

The foregoing argument, we submit, demonstrates that the objectives of the 1958 statute could not have been those attributed to it, on the basis of assumptions, by the Courts below. Even if there were some legislative declaration or history or other extrinsic evidence to show that those were the statutory objectives (and the record contains no such extrinsic evidence), our argument demonstrates, at the very least, that the two alleged objectives *cannot be inferred from the statute itself*, because the statute (1) permits some operations that are more difficult to police than those it prohibits, and (2) prohibits operations that could not possibly affect the interests of Virginia.

This latter proposition is most important, because the lower courts' attribution of the two objectives to the statute was based on nothing more than *assumption*. The record contains not a single syllable of evidence to indicate that those were the statutory objectives. While a state may, upon any reasonable basis, discriminate between persons in the exercise of

its police power, this Court has made it clear that it is not the function of the judiciary "to conjure up possible situations which might justify the discrimination." *Mayflower Farms, Inc.* v. *Ten Eyck*, 297 U.S. 266, 274.

As Chief Justice Hughes said in *Borden's Farm Products Co.* v. *Baldwin*, 293 U.S. 194, 210:

> [I]t is increasingly important that when it becomes necessary for the Court to deal with the facts relating to particular commercial or industrial conditions, they should be presented concretely with appropriate determinations upon evidence, so that conclusions shall not be reached without adequate factual support.

Since the record in this case reveals no "adequate factual support" for the basis of discrimination suggested by the lower courts, those courts, could only have acted upon assumptions or by exceeding the permissible scope of judicial notice. The object of this statute, so far as revealed by the statute itself and by anything in the record, is neither more or less than to prohibit the operation of coin-operated gaming devices in establishments built on or over some parts of Maryland's waters, while permitting similar establishments built on or over other parts of those waters; thus severely impairing the earning capacity of the former establishments to the obvious advantage of the latter. By permitting four counties to license business of the type conducted by the appellants the state has recognized that in those counties such business does not impair the public health, safety and morals. The state may not, therefore, within those four counties, forbid the operations of some entrepreneurs, while permitting the similar operations of others. *Fairchild*

v. *Schanke*, 232 Ind. 480, 113 N.E. 2nd 159 (1953). The 1958 statute, by arbitrarily discriminating between classes of entrepreneurs within those four counties, without any basis related to a concern for the public health, safety or morals, violates the constitutional guaranty of equal protection of the laws.

The applicable principle of law is well expressed by the Supreme Court of Indiana in *Fairchild* v. *Schanke*, *supra*, 232 Ind. at 487, 113 N.E. 2d at 162-63, quoting from its opinion in another case:

> The legislature may make a classification for legislative purposes, but it must have some reasonable basis upon which to stand. It is evident that differences which would serve for a classification for some purposes would furnish no reason for a classification for legislative purposes. Such legislation must not only operate equally upon all within the class, but the classification must furnish a reason for and justify the making of the class; that is, the reason for the classification must inhere in the subject-matter, and rest upon some reason which is natural and substantial, and not artificial. Not only must the classification treat all brought under its influence alike, under the same conditions, but it must embrace all within the class to which it is naturally related. Neither mere isolation nor arbitrary selection is proper classification. (Citing numerous authorities).

Since, as we have shown, the statute may operate in ways bearing no relation to the objectives attributed to it by the lower courts and since there is nothing in the record to show any objective, other than the naked purpose to make an arbitrary discrimination, to which this classification could be said to be fairly and substantially related, the Court of Appeals committed error in volunteering its two assumptions as the statu-

tory objectives. *Mayflower Farms, Inc.* v. *Ten Eyck, supra;* cf. *Borden's Farm Products Co.* v. *Baldwin, supra; United States* v. *Carolene Products Co.*, 304 U.S. 144.

The 1958 statute, in addition to denying the appellants the equal protection of the laws guaranteed them by the Fourteenth Amendment, violates their rights under the due process clause of that Amendment.

As we have shown in the preceding section of this Jurisdictional Statement, the due process question was raised below by the appellants through the allegations in their complaint that enforcement of the statute would deprive them of their rights to engage in a lawful licensed business, that it would render their "property, premises and business . . . largely valueless", and that the statute was invalid for ambiguity. That the complaint did not *in haec verba* refer to the due process clause is of no consequence, for, as this Court said in *Bryant* v. *Zimmerman*, 278 U.S. 63, 67:

> There are various ways in which the validity of a state statute may be drawn in question on the ground that it is repugnant to the Constitution of the United States. No particular form of words or phrases is essential, but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time. And if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented.

See also *Braniff Airways, Inc.* v. *Nebraska State Board*, 347 U.S. 590, 598-599; Robertson and Kirkham, *Jurisdiction of the Supreme Court of the United States* (Wolfson and Kurland ed. 1951) § 85.

Moreover, we submit, the due process question was inherent in the context in which the equal protection question was presented and argued. This Court said in *Truax* v. *Corrigan*, 257 U.S. 312, 332, 333:

> It [the due process clause], of course, tends to secure equality of law in the sense that it makes a required minimum of protection for every one's right of life, liberty and property, which the Congress or the legislature may not withhold. Our whole system of law is predicated on the general, fundamental principle of equality of application of the law.
>
> * * *
>
> Mr. Justice Matthews, in *Yick Wo* v. *Hopkins*, 118 U.S. 356, 369, speaking for the court of both the due process and the equality clause of the Fourteenth Amendment, said: "These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; *and the equal protection of the laws is a pledge of the protection of equal laws.*"

And in *Reagan* v. *Farmers Loan and Trust Co.*, 154 U.S. 362, 399, the Court said:

> The equal protection of the laws which, by the Fourteenth Amendment, no State can deny to the individual, forbids legislation, in whatever form it may be enacted, by which the property of one individual is, without compensation, wrested from him for the benefit of another, or of the public.

See also *Smith* v. *Texas*, 233 U.S. 630, 636, in which the Court said:

> Life, liberty, property and the equal protection of the law, grouped together in the Constitution, are so related that the deprivation of any of those

> separate and independent rights may lessen or extinguish the value of the other three. In so far as a man is deprived of the right to labor his liberty is restricted, his capacity to earn wages and acquire property is lessened, and he is denied the protection which the law affords those who are permitted to work.

Paraphrasing the above language from *Smith* v. *Texas,* in so far as these appellants are deprived of the right to engage in their lawful business, their liberty is restricted, their capacity to earn profits and acquire property is lessened, and they are denied the protection which the law affords those who are permitted to engage in that business. Moreover, there is a taking here of property they have already invested in their lawful business. Such a taking, without adequate compensation, is not sanctioned by law. *Seattle Title Trust Co.* v. *Roberge,* 278 U.S. 116; *Truax* v. *Corrigan, supra.*

The 1958 statute is not unlike a zoning ordinance which, on a theory of fire or disease hazard, forbids a certain use of property in one district, while permitting that use in another, similar district. Such a zoning ordinance deprives the restricted owner of his property without due process of law. *Applestein* v. *Baltimore,* 156 Md. 40, 143 Atl. 666 (1928).

Zoning, moreover, though a well recognized exercise of police power, may not work retroactively to prohibit a lawful use to which property has been put. *Dobbins* v. *Los Angeles,* 195 U.S. 223. This doctrine of nonconforming use is recognized both by the legislature and the courts of Maryland. See, for example, *Schiff* v. *Board,* 207 Md. 365, 114 A. 2nd 644 (1955); *Beyer* v. *Baltimore,* 182 Md. 444, 34 A. 2nd 765 (1943); *Landay*

v. *Board of Zoning Appeals*, 173 Md. 460, 196 Atl. 293, 114 A.L.R. 984 (1938).

A splendid discussion of the effect of zoning laws on a lawful business is found in *Jones* v. *The City of Los Angeles*, 211 Cal. 304, 295 Pac. 14 (1931). In concluding its opinion the Supreme Court of California said (211 Cal. at 321, 295 Pac. at 22):

> Our conclusion is that where, as here, a retroactive ordinance causes substantial injury and the prohibited business is not a nuisance, the ordinance is to that extent an unreasonable and unjustifiable exercise of police power.

The reported case closest to the instant case, both in fact and in law, is *O'Connor* v. *The City of Moscow*, 69 Idaho 37, 202 P. 2nd 401 (1949). There the City of Moscow passed legislation making it unlawful to open or operate in a certain area any new or additional businesses in which any pool, billiard, card or dice game is played, or draft beer or liquor is sold by the drink, or coin-operated gaming devices are maintained. It was further provided that "Any change of ownership of an existing business of the type herein defined shall be deemed a new or additional business."

According to the opinion: "The express purpose of the ordinance is to confine such businesses to a limited area in order to make policing thereof easier and to promote the peace, morals, safety and general welfare of the people of Moscow". 69 Idaho at 40, 202 P. 2nd at 402.

Respondent's attempt to sell his business in the restricted area was prevented by the application of the provision of the ordinance above quoted. He brought his action to have the ordinance declared void and, upon stipulated facts substantially as above, the trial

court declared the quoted part of the ordinance void and enjoined its enforcement. The City of Moscow appealed. The court declared (69 Idaho at 40-41, 202 P. 2nd at 402):

> So long as appellant permits the operation of such businesses, by licenses and other regulations, they must for the purposes of this case be treated as any other lawful businesses.

The Court held (69 Idaho at 43, 44, 202 P. 2nd at 404, 405):

> Since lawful existing uses, although non-conforming, cannot be constitutionally eradicated because by so doing, the due process clauses are violated, it naturally follows in one logical step that the prevention of the sale of an existing business by such an ordinance has the same result. . . .
>
> * * *
>
> Treating the ordinance as a pure police measure, designed, as expressed therein, to make easier the policing and health inspection of such businesses, and to prevent loitering and nuisances, we are of the opinion that the provision complained of is not a reasonable exercise of the police power and does not bear any reasonable, real or direct relationship, to the objects and purposes sought to be accomplished. Existing businesses under the same ownership are permitted to remain. Policing and health inspections and the prevention of loitering and nuisances are therefore not actually made easier, since the city authorities must continue to police and inspect businesses in the same area as before.

CONCLUSION

It is submitted that Chapter 18 of the Acts of Maryland of 1958 violates the Fourteenth Amendment to the Constitution of the United States in that it denies to the appellants the equal protection of the laws and, without due process of law, deprives them of their liberty to engage in a lawful business and destroys the value of the property they have invested in that business.

Respectfully submitted,

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